SUPREME COURT, U. S.

Supreme Court of the United States

October Term, 1967

No. 645

JOSEPH LEE JONES and BARBARA [illegible] JONES,

Petitioners,

vs.

ALFRED H. MAYER COMPANY, a Corporation, ALFRED RAHER COMPANY, a Corporation, PARKWOOD COUNTRY CLUB, INC., a Corporation, ALFRED H. MAYER, an Individual, and an Officer of the Above Corporations,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR THE STATE OF CALIFORNIA AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE.

The Attorney General of the State of California is the chief law officer of the State of California,[1] and as such is concerned with establishing and maintaining a safe and orderly society for the citizens of that state. To this end, the Attorney General realizes that the problems which plague our society cannot be solved without eliminating the evils which create and cause these problems.

[1]California Constitution, Article, V, § 13.

Segregation and discrimination in housing has long been recognized as one of the major evils of our present day society.[2] From discrimination and segregation in housing arises the ghetto; from the ghetto, frustration, hopelessness, and despair,[3] and from these feelings, the anti-social attitude which breeds crime, disrespect for law and spontaneous violence.

The Attorney General of California feels that to minimize the lawlessness that pervades our cities, we must eradicate the evils of discrimination and segregation and eliminate from our society the restrictive ghettoes which plague our cities.

The instant case could not have arisen in California, where the legislature has enacted laws which prevent such admitted discrimination by subdevelopers.[4] But the presence of the legislation within her own state does not end California's concern. Housing discrimination is a nation-wide problem, and the attitudes which create ghettoes, as well as the attitude created by the ghetto, migrate with the nation's citizens as they move from state to state. Being the largest state in the union, with the largest number of immigrants, California[5] has a primary concern with the problem of housing discrimination.

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[2]*Jackson v. Pasadena*, 59 Cal. 2d 876 (1963).

[3]*Berman v. Parker*, 348 U.S. 26 (1954).

[4]Section 51 of Civil Code; § 35700 *et seq.*, Health and Safety Code.

[5]Every day brings new citizens to California from other sections of the nation. For the 5-year period from 1955 to 1960, 2,148,255 residents of other parts of the Union moved to this state. (U.S. Bureau of Census P.C. (2)-2B). During the year ending July 1, 1965, California's population showed an approximate net increase of 340,000 attributable solely to migration from within the United States. (Information supplied to our office by the Office of Population Studies, California Department of Finance).

If the lower court decision is permitted to stand, other developers will be able to create new ghettoes throughout the nation, thus aggravating an already serious national problem.

It is with these thoughts in mind that California files this amicus curiae brief on behalf of the petitioners, Joseph and Barbara Jones.

Introduction to Argument.

Amicus joins with petitioners and other amici who have urged this court to hold that sections 1981-1983 of Title 42 of the United States Code give rise to a cause of action against the respondents without the involvement of the state. However, amicus believes that the argument has been fully developed and would like to devote its brief to another aspect of this action which we think might be helpful to the court. If this court is of the opinion that state action must be present to state a cause of action against respondents, under sections 1981-1983 of Title 42 of the United States Code, amicus believes that such state action is present herein.

ARGUMENT.

I.

There Is State Action in This Case by Virtue of the Licenses Held by Respondents.

Under the expanding concept of state action, this court has on numerous occasions held a variety of activities or non-activities to be state action. *Mulkey v. Reitman,* 387 U.S. 369 (1967), (constitutional amendment permitting private discrimination); *Evans v. Newton,* 382 U.S. 296 (1966) (quasi abandonment of public park); *Lombard v. Louisiana,* 373 U.S. 1 (1963) (official encouragement of private discriminatory conduct); and *Burton v. Wilmington, Parking Authority,* 365 U.S. 715 (1961) (government tolerance of private discrimination in a public building).

In each of the above-cited cases, the actual act of discrimination was carried out by a private person who, without state aid, encouragement or involvement, would have been free to commit an act of racial discrimination.

See also:

Robinson v. Florida, 378 U.S. 153 (1964);

Anderson v. Martin, 375 U.S. 399 (1964);

Turner v. City of Memphis, 369 U.S. 350 (1962); and

Garner v. Louisiana, 368 U.S. 157 (1961).

In all of the above cases, however, the state had become so involved in the private conduct as to convert that private conduct to prohibited state conduct.

Here, respondents are licensed corporations doing business within the State of Missouri and we urge this

court to accept the view that the possession of those licenses is sufficient state involvement to invoke the prohibitions of the Fourteenth Amendment.

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), this court held that a lessee of a governmental agency could not discriminate in the course of its business because any lease between the government and a private person carried an implied covenant that the premises would be used in a non-discriminatory manner. This court in arriving at that result announced, at 725:

> "But no state may effectively abdicate its responsibility by either ignoring them or by merely failing to discharge them whatever the motive may be. . . . By its inaction the Authority and through it the state has not made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The state has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which on that account cannot be considered to have been so purely private as to fall without the scope of the Fourteenth Amendment."

See also:

Smith v. Holiday Inns of America, Inc., 336 F. 2d 630 (1964);

Hampton v. City of Jacksonville, 304 F. 2d 320 (1962);

Derrington v. Plummer, 240 F. 2d 922 (1957); and

Tate v. Dept. of Conservation, Virginia, 231 F. 2d 615 (1956).

No logical distinction exists between a citizen who leases a building from a governmental agency to be used as a commercial venture for his own profit and a citizen, who by virtue of a license granted by a governmental agency, conducts a particular type of business for which the license is granted. Each is limited in the conduct of its business: the lessee by the lease provisions and restrictions placed upon him by the government and the licensee by the rules and regulations that are attendant upon the holding of that license. It seems to us beyond argument to say that the state is involved in one activity and not the other, for only by virtue of that license can the individual do business within that particular state. His total business existence is dependent upon the license he secures from the state. The prestige of the state is behind his business. And any deviation from the rules and regulations of that state causes a revocation of the license to do business in the state.

In *Garner v. Louisiana*, 368 U.S. 157 (1961), Justice Douglas in his concurrence could find no logical distinction between a lessee of public property and a licensee of a governmental agency when he said at 184-85:

> *"I do not believe that a state that licenses a business can license it to serve only whites or only blacks or only yellows or only browns. Race is an impermissible classification when it comes to parks or other municipal facilities by reason of the Equal Protection Clause of the Fourteenth Amendment. By the same token, I do not see how a state can constitutionally exercise its licensing power over businesses either in terms or in effect to segre-*

gate the races in the licensed premises. The authority to license a business for public use is derived from the public. . . . I see no way whereby licenses issued by a state to serve the public can be distinguished from leases of public facilities (*Burton v. Wilmington Parking Authority, supra*) for that end. One can close the doors of his home to anyone he desires. *But, one who operates an enterprise under a license from the government enjoys a privilege that derives from the people . . . But the necessity of a license shows that the public has rights in respect to those premises. The business is not a matter of mere private concern. Those who license enterprises for public use should not have under our Constitution the power to license it for the use of only one race.* For there is an overriding constitutional requirement that all state power be exercised so as not to deny equal protection to any group. . . ." (Emphasis added.)

See also concurring opinions of Justice Douglas; *Mulkey v. Reitman,* 387 U.S. 369, 381 (1967); *Lombard v. Louisiana,* 373 U.S. 267, 276 (1963).

Given the grave crisis in the nation's urban centers, this country cannot tolerate the use of any form of governmental assistance which permits private discriminatory conduct. Respondents, being licensees and doing business pursuant to their licenses, cannot use the privilege granted by a license to practice racial discrimination.

The language of Justice Douglas in *Mulkey v. Reitman, supra,* at 385 is apropos:

"These licensees are designated to serve the public. These licenses are not restricted, and could not

be restricted, to effectuate a policy of segregation. That would be state action that is barred by the Fourteenth Amendment. There is no difference, as I see it, between a State authorizing a licensee to practice racial discrimination and a State, without any express authorization of that kind nevertheless launching and countenancing the operation of a licensing system in an environment where the whole weight of the system is on the side of discrimination. In the latter situation the State is impliedly sanctioning what it may not do specifically.

". . . .

"Since the real estate brokerage business is one that can be and is state-regulated and since it is state-licensed, it must be dedicated, like the telephone companies and the carriers and the hotels and motels, to the requirements of service to all without discrimination—a standard that in its modern setting is conditioned by the demands of the Equal Protection Clause of the Fourteenth Amendment."

II.

Respondents, by Creating the Segregated Community of Paddock Woods, Have Engaged in State Action Resulting in Illegal Racial Zoning.

Judged by the opinions below, respondents' major defense to their discriminatory acts is the assertion that they are private property owners, and by this status shielded from constitutional restrictions against racial discrimination.

If respondents were individuals attempting to sell a single family home after years of personal occupancy

to another individual, perhaps their argument would be persuasive. But respondents, with one exception, are not individuals engaged in a rare, isolated sale; they are corporations[6] for which such sales are an economic necessity of life. Respondents are not selling a family homestead; they are selling empty lots and empty houses. And most importantly, respondents do not offer individual homes already a part of an established community, but instead offer 100 lots whose communal existence is largely dependent upon their interrelationship with each other.

Respondents have created a community. They have built streets, determined boundaries, established recreational facilities, and created an organization—The Board of Trustees—which will oversee the community's future. Indeed, they have even decreed the community's identity, since it was they that named the town Paddock Woods.

In short, respondents are no more entitled to the title of "individual property owner" than was the corporation which controlled Chickasaw, Alabama, the community which formed the background for *Marsh v. Alabama,* 326 U.S. 501 (1946). In *Marsh,* the respondents argued that since Chickasaw was privately owned and operated, it could be treated in the same manner as a private home, and consequently, the town's owners could prevent the dissemination of religious literature upon its streets. The Supreme Court disagreed.

> "Ownership does not always mean absolute dominion. The more an owner, for his advantage,

[6]The one exception is Alfred H. Mayer who is listed as an officer of each of the corporations involved in the suit. Consequently, it appears that his liability will arise solely from the corporations' actions.

> opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.
>
> ". . . .
>
> "Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication have remained free." *Marsh v. Alabama, supra,* at 506-07.

Chickasaw, of course, was a company town, where virtually all the governmental functions were subjected to the whims of the private corporation. Here, admittedly, fewer governmental functions are manifestly present. But we do not believe the sheer number of traditional governmental functions controls the *Marsh* decision.

"What is 'private' action and what is 'state' action is not always easy to determine." *Evans v. Newton,* 382 U.S. 296, 299 (1966); see also *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961). One can find a "private" parallel to virtually every "public" function. Education is traditionally a state function, but it also can be private, and when private, open to restrictions based on race or religion. *Pierce v. Society of Sisters,* 268 U.S. 510 (1925). The same holds true for recreational facilities, *Evans v. Newton, supra; Watson v. Memphis,* 373 U.S. 526 (1959); *Hampton v. City of Jacksonville,* 304 F. 2d 320; or public versus private trusts, *Pennsylvania v. Board of Trustees,* 353 U.S. 230 (1957).

Given the difficulty of labeling functions "private" or "public", what seems critical is the nature of the functions involved, the "predominant character and purpose" (*Evans v. Newton, supra,* at 502) of those functions, and the degree to which the control of the functions by an ostensibly private group affects men's lives. At some point, no matter how a private entity chooses to define its role, it will assume too many functions, or functions of too critical a nature, to permit it to remain classified as "private" and retain the freedom from constitutional responsibility that term implies. As stated by Justice Douglas in *Evans v. Newton,* at 299:

> "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state actions."

Evans related to a private city park, but the reasoning behind the decision has also been applied in *Terry v. Adams,* 345 U.S. 461 (1953), where the conduct involved was private control of the vote; in *Public Utilities Commission v. Pollak,* 343 U.S. 451, 462 (1952), which involved a public utility transportation system in Washington, D.C.; and, of course, in *Marsh, supra,* where the issue was free access to the streets of a company town.

The logic seems equally applicable here. When a private corporation creates a closely-knit community, and by its decisions can control the destinies of 100 families now, and ultimately the destiny of 1000, it ceases to operate in an exclusively private domain. In building a community of this magnitude, the private

subdeveloper engages in conduct equally as "impregnated with a governmental function" as any activity in *Evans, Terry, Public Utilities Commission,* or *Marsh* —the "state and municipal function" of zoning. *Euclid v. Ambler Co.,* 272 U.S. 365, 389 (1926), *et seq.; Berman v. Parker,* 348 U.S. 26, 34-35 (1954).

Obviously, no municipality could establish racial restrictions as part of a zoning ordinance. *Buchanan v. Warley,* 245 U.S. 60, 79 (1917); *Harmon v., Tyler,* 273 U.S. 668 (1927). And as Justice Douglas noted in his concurring opinion in *Mulkey v. Reitman,* 387 U.S. 369 (1967) at 384:

> "When the State leaves that function [zoning] to private agencies or institutions who are licensees and who practice racial discrimination and zone our cities into white and black belts or white and black ghettoes, it suffers a governmental function to be performed under private auspices in a way the State itself may not act. . . ."

We do not believe the proprietors of Chickasaw, Alabama, could, by corporate fiat, have prevented Negroes from living within the city's boundaries solely because of their race, for the right to acquire property free from racial discrimination is just as fundamental as the rights of free speech, religion, press, and assembly. *Shelley v. Kramer,* 334 U.S. 1, 10 (1948). Indeed as *Shelley* stated, at 10:

> "Equality in the enjoyment of property rights was regarded by the framers of that [Fourteenth] Amendment as an *essential pre-condition* to the realization of other civil rights and liberties which the Amendment was intended to guarantee. . . ." (Emphasis added.)

Paddock Woods seems no different. One thousand people will gain this "essential pre-condition" to civil liberties when they become part of the community, and respondents cannot withhold this right from petitioners simply because they disapprove of Mr. Jones' race. Their permit them to retain the private luxury of prejudice conduct has become too imbued with public meaning to in their business dealings.

Conclusion.

For the reasons stated above, as well as the arguments enunciated in petitioners' opening brief, California urges that the judgment below be reversed.

Respectfully submitted,

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